

2014 WL 9967653 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

James L. CASAL, an individual; and Teresita Clarkson, an individual;, Plaintiffs,
v.

Maria Luz ADRIATICO, an individual; and Does 1-10, inclusive;, Defendants.

No. 56201400453671.
June 23, 2014.

Request for Judicial Notice [Filed Separately].

Petition Filed: May 20, 2014

Hearing Date: July 10, 2014

Time: 8:30 a.m.

Dept.: 41

**Plaintiffs' Opposition to Defendant's Demurrer to Their Petition for (1) Financial Elder Abuse
and (2) Abuse of Durable Power of Attorney; and, Memorandum of Points and Authorities.**

T. Randolph Catanese, Esq., State Bar No. 110308, William R. Gynan, Esq., State Bar No. 262273, Catanese & Wells, a Law Corporation, 31255 Cedar Valley Drive, Suite 213, Westlake Village, California 91362, Telephone: 818-707-0407 / Facsimile: 818-707-1161, for plaintiffs, James L. Casal and Teresita Clarkson.

(Assigned to the Hon. Vincent J. O'Neil Dept. 41).

TO DEFENDANT MARIA LUZ ADRIATICO AND TO HER ATTORNEYS' OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs, JAMES L. CASAL and TERESITA CLARKSON, oppose the demurrer by MARIA LUZ ADRIATICO to their *Petition for Financial Elder Abuse and Abuse of Durable Power of Attorney* now set for hearing before the Hon. Vincent J. O'Neil on July 10, 2014 at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 41 of the Ventura County Superior Court located at 800 South Victoria Avenue, Ventura, California 93009.

The demurrer argues that Plaintiffs lack standing to pursue the elder abuse claim and the demurrer further argues that Plaintiffs should not be permitted to demand an accounting or proceed on their claim of abuse of the durable power of attorney by the Defendant. The demurrer should be overruled in all respects because under the law the Plaintiffs do have standing to pursue the elder abuse claim and the abuse of the durable power of attorney claim. *See Estate of Lowrie* (2004) 118 Cal. App.4th 220; Cal. Welf. & I. C. §15657.3(d)(2); Cal. Prob. C. §48(a),(b); and, Cal. Prob. C. §354. *These statutes and the opinion of the appellate court in the Estate of Lowrie case confirm that the Plaintiffs are interested persons with standing to bring the elder abuse action. Further, Sections 4540(d) and 4541(b), (c) of the California Probate Code additionally confirm that Plaintiffs have standing to pursue the claim for abuse of a durable power of attorney.*

The opposition to the demurrer is based upon this notice, the appended memorandum of points and authorities, the verified petition and other matters part of the court file in this case, the separate request for judicial notice and upon such further argument as the court may entertain at the time of the within hearing.

Respectfully Submitted,

CATANESE & WELLS

A Law Corporation

By:

T. Randolph Catanese

Attorney for Plaintiffs JAMES L. CASAL and TERESITA CLARKSON

DATED: June 20, 2014

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO DEMURRER BY DEFENDANT**

I. INTRODUCTION.

A. Statement of Facts and Prior Probate Court Proceedings.

This case involves a family whose parents immigrated to the United States from the Philippines. It involves adult children who survive a father who passed away in 2013 and a mother who is under a court-ordered conservatorship. At the time the events occurred which support the claims for **financial elder abuse** and **abuse** of a durable power of attorney, the father (Francisco Ermitano Casal) was in his early 90s and the mother (Antonina L. Casal) was also in her early 90s. The father died on January 27, 2013. (Petition ¶¶ 3, 6). Mother purportedly signed a trust on March 9, 2013, at the age of 96 years and two months following her husband's death. (*See Request for Judicial Notice - Petition for Appointment of Temporary Conservator* (filed April 4, 2014) Case No. 56-2014-00451186-PR-CP-OXN and *Affidavit - Change of Trustee.*)

Plaintiffs filed the Petition alleging **elder abuse** and **abuse** of a durable power of attorney against their sister based upon their sister's orchestrated effort to take cash, property, equities, insurance proceeds and real estate from their father (and with an intent to do the same to their mother when she passes).

The Petition states the following facts:

- (1) Francisco Ermitano Casal ("FATHER") died on January 27, 2013 at the age of 94 (Petition ¶ 3);
- (2) Antonina L. Casal ("MOTHER") was appointed the executor and the sole beneficiary of FATHER's estate under his will (Petition ¶ 3);
- (3) MOTHER gave a purported waiver of her appointment as the executor over her husband's estate to Defendant MARIA LUZ ADRIATICO ("MARIA") *via a hand-written writing dated May 6, 2005, approximately 8 years before FATHER's death* (Petition ¶ 3) (*see Request for Judicial Notice - Waiver of Appointment as Executor*);
- (4) MARIA thereafter petitioned this Court in the Probate Division to be appointed the executor over FATHER's estate which appointment was confirmed by the Court on August 15, 2013 (Petition ¶ 3) (*see Request for Judicial Notice - Appointment of Executor*);
- (5) MARIA then filed with this Court an *Inventory and Appraisal* on December 19, 2013, regarding her FATHER's estate (a copy of the *Inventory and Appraisal* is appended to the Petition as Exhibit "A");

(6) Plaintiffs, James L. Casal (“JAMES”) and Teresita Clarkson (“TERESITA”), thereafter filed an *Objection to the Inventory and Appraisal* with this Court on January 15, 2014, and later a Petition under [Probate Code §850](#) on February 26, 2014 directed against MARIA in an effort to recover cash and property taken by MARIA from FATHER's estate (Petition ¶ 4) (*see* Request for Judicial Notice - *Objection to the Inventory and Appraisal and Petition under Probate Code §850*);

(7) Notwithstanding the efforts of JAMES and TERESITA to recover cash and property taken by MARIA from their FATHER, MARIA refused to account for the cash and property and refused to cooperate with JAMES and TERESITA in returning property in her possession which was properly the property of their FATHER's estate - the cash and liquid equities portion of the property had a value in excess of \$400,000.00 (Petition ¶ 4);

(8) In the Inventory and Appraisal filed with the Court by MARIA she identified numerous accounts, including bank accounts, brokerage accounts and insurance accounts which provided that MARIA would be the owner of FATHER's estate property by reason of an alleged claim to be the “survivor” of the estate property (Petition ¶ 4);

(9) JAMES and TERESITA raised issues with this Court in the Probate Division related to the mental status and welfare of MOTHER during a hearing on March 20, 2014 - by reason thereof, MARIA with JAMES and TERESITA agreed that an independent conservator be appointed over MOTHER - a conservator was appointed over MOTHER on April 15, 2014 (Petition ¶ 6);

(10) When the Court made the order appointing a conservator over MOTHER the Court further ordered that separate funds of MOTHER which were transferred by MARIA to a joint account with MARIA and MOTHER be frozen and that such funds be used solely for the care and welfare of MOTHER (Petition ¶ 6) (a copy of the Court's order is appended to the Petition as Exhibit “B”); and,

(11) On March 24, 2014, MARIA caused to be filed with the Ventura County Clerk and Recorder an Affidavit - Change of Trustee wherein MARIA affirms that FATHER was a party to a grant deed as was MOTHER to real estate located in Simi Valley, California - further, the document affirms that on March 9, 2013, MOTHER (at the age of 96 years) transferred the real property from her personal estate via a quitclaim deed to a purported trust in her name on April 12, 2013, and further that MARIA is the “sole successor Trustee of the Trust” (*see* - Request for Judicial Notice - *Affidavit - Change of Trustee*).

The facts of this case are very close to the facts of the *Lowrie* case. MARIA is the executor and trustee for her FATHER and MOTHER, respectively. Moreover, two children, JAMES and TERESITA, each allege that MARIA has committed **financial elder abuse** against their FATHER. In addition, MARIA has acknowledged her *survivorship claim* to FATHER's property which arose at the end of FATHER's life and when he was most vulnerable and dependent on MARIA. And, finally, MARIA acknowledges obtaining a purported trust from her MOTHER in 2013 immediately after her FATHER died and when her mother was aged, bedridden and lacking capacity. (*See Affidavit- Change of Trustee* - attached medical letter re incompetency.)

B. Current Status of Probate Proceedings.

MARIA remains the executor over FATHER's estate. MOTHER is under a court-ordered conservatorship of her person and her estate. JAMES and TERESITA have no pending petitions before the Probate Division.

II. SUMMARY OF ARGUMENT.

At paragraph 1 of the Petition, JAMES and TERESITA state that they are “interested persons” regarding the claims made in the Petition. The Petition specifically references [Welfare & Institutions Code §15657.3\(d\)\(2\)](#) and the appellate case of *Estate of Lowrie* (2004) 118 Cal. App.4th 220 as authority for their standing to bring the **elder abuse** claim against their sister MARIA

who is the executor over their FATHER's estate. Moreover, JAMES and TERESITA bring the **abuse** of durable power of attorney claim based upon [Probate Code §§4540, 4541](#) and at paragraphs 18 through 23 of the Petition confirm that they did seek an accounting from their sister MARIA within sixty (60) days of the Petition with no response by MARIA. Accordingly, the demurrer is without merit and should be overruled.

III. THE COURT SHOULD LIBERALLY CONSTRUE THE STANDING REQUIREMENT FOR PLAINTIFFS' CLAIM OF **ELDER ABUSE** SINCE BY DOING SO THE COURT WILL BE RECOGNIZING THE STATE'S POLICY OF PROTECTING THE **ELDERLY**.

A. California Law Favors a Liberal Interpretation of the Standing Requirement Under the **Elder Abuse** Act.

California has a strong policy of protecting the **elderly**. The state legislature enacted [Welfare & Institutions Code §15600 et seq.](#) to protect a particularly vulnerable portion of the population from gross mistreatment by **financial** or physical **abuse**. The statute allows for heightened remedies including attorney fee awards even after the **abused elder** dies. *See Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 779.

[Section 15657.3\(d\)](#) identifies those persons who have standing to bring an **elder abuse** lawsuit after the death of an **elder**. “Standing, for purposes of the **Elder Abuse** Act, must be analyzed in a manner that induces interested persons to report **elder abuse** and to file lawsuits against **elder abuse** and neglect... (i)n this way the victimized will be protected.” *See Estate of Lowrie* (2004) 118 Cal. App.4th 220, 228. The policy of protecting the **elderly** should be advanced and not discouraged when the issue of standing is before the court on a demurrer. If a trial court were to adopt a rigid view of standing for purposes of the **Elder Abuse** Act the policy would be subverted. “Any definition given to [Welfare and Institutions Code section 15657.3, subdivision \(d\)](#) must be sufficiently elastic to fulfil the purposes of the **Elder Abuse** Act... (a) decision as to whether a person has standing may be intertwined with other issues in **elder abuse** cases... (t)his approach is consistent with the one taken to determine who is an interested person entitled to file petitions for probate.” *Id.* at 230 (citing [California Probate Code §48](#) - a flexible approach regarding probate petitions should be adopted - *Arman v. Bank of America* (1999) 74 Cal. App.4th 697, 701.)

The Lowrie court in its opinion stated “(e)lders frequently relinquish control to those who have gained their trust, becoming emotionally and **financially** dependent... (i)n such circumstances, **abusers** become the **elder** or dependent adult's trustee or executor and primary beneficiary... (f)or example, most **financial abuse** is perpetrated by one person, usually a family member or other trusted person.” *Id.* at 230. In its conclusion, the Lowrie court opinioned - *Courts must interpret the standing provision in [Welfare and Institutions Code section 15657.3, subdivision \(d\)](#) to deter not encourage such **abuse**. If **abusers** gain control of an estate, they may not use a restrictive interpretation of standing as an escape hatch.*

Id. at 230.

B. JAMES and TERESITA Have Standing to Pursue the Petition.

The Petition states that JAMES and TERESITA are interested persons regarding their FATHER's estate. They have an interest in his estate since they are the natural children of FATHER and since FATHER's estate by his will passed to MOTHER and MOTHER's estate will pass to JAMES and TERESITA. (The Petition states that MOTHER has a will - Petition ¶ 8). Further, the Petition states that MARIA makes a claim to various assets of FATHER's estate by reason of the exercise of a durable power of attorney in creating bank accounts and by means of her acknowledgement that she claims a “survivorship” claim to assets of her FATHER in contravention of the interests of the Plaintiffs. (Petition ¶ 4). The Petition further asks for relief under [California Probate Code §259](#) (Petition ¶ 29). If the court were to find that MARIA predeceased her FATHER then the Plaintiffs would have an increased interest in the estate due to their relationship to MOTHER.

In *Estate of Lowrie* the mother had three children. The mother also had six grandchildren. When the mother's husband died he left significant real estate and personalty to his wife. Later, a son began to operate and manage mother's assets which included taking on the position as executor and trustee. Without the knowledge of other family members, the mother transferred real estate and all of her personal property to her son who was also the executor and trustee. When mother died her estate was worth approximately \$1,000,000.00. After mother died a granddaughter filed a petition seeking an order to invalidate the trust as amended, for **elder abuse** and for an order finding that the son be disinherited under [California Probate Code §259](#). Prior to trial on the petition, the son argued that the granddaughter had no standing to bring the **elder abuse** case. The trial court allowed the **elder abuse** claim and found against the son finding **elder abuse** and other acts of fraud. The son then filed an appeal to the trial court judgment.

*The appellate court in Lowrie found that the granddaughter did have standing to pursue the **elder abuse** claim and affirmed the trial court's judgment. Specifically, the appellate court found that it would be unreasonable to expect the son who was the executor and trustee to bring an **elder abuse** lawsuit against himself. The appellate court found standing for the granddaughter as an interested person because she would succeed to her grandmother's estate if the son were disinherited by reason of [Probate Code §259](#). (The court went on to state that a beneficiary under a will with a contingent interest is sufficient for standing and a beneficiary under a later will whose interest may be impaired by probating an earlier will is an interested person who has a pecuniary interest in an estate that may be impaired or defeated by probate of the earlier will or who may benefit by having it set aside. *Id.* at 228, citing [Estate of Plaut \(1945\) 27 Cal.2d 424, 428-429](#) and [Estate of O'Brien \(1966\) 246 Cal. App.2d 788](#).)*

In this case, FATHER's estate will go to MOTHER and at MOTHER's death the estate of MOTHER (which will include FATHER's estate) will go to JAMES and TERESITA (and other family members). Should the Court find that MARIA did commit **elder abuse** regarding her FATHER then any interest MARIA had in FATHER's estate will be lost under [California Probate Code §259](#) and therefore the beneficiaries of such a finding will include JAMES and TERESITA.

[Section 48 of the California Probate Code](#) defines “interested person” to include a child who has a property right in or claim against an estate of a decedent which may be affected by the proceeding. Moreover, [§48\(b\)](#) states “(t)he meaning of ‘interested person’ as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.” (See [Cal. Prob. C. §48\(a\)\(1\), \(b\)](#)). Further, the California Supreme Court in *Estate of Giralдин* enhanced and recognized the rights of beneficiaries to bring actions for remedies where a trustee violated a duty under a trust after the death of a settlor. The court specifically found that “after the settlor's death, the beneficiaries have standing to assert a breach of the fiduciary duty the trustee owed to the settlor to the extent the breach harmed the beneficiaries.” See *Estate of Giralдин* (2012) 55 Cal.4th 1058, 1075. In making this opinion the California Supreme Court recognized that *standing* should be viewed broadly to protect the rights of beneficiaries in the probate and estate context. *Id.* at 1075. (Moreover, the court indicated that a claim for **elder abuse** under [Welfare & Institutions Code §15600 et seq.](#) might be a possible remedy under appropriate circumstances. *Id.* at 1073.) More recently, in *Estate of Frank P. Dito* the appellate court found that it would be nonsensical and contrary to the expressed purposes of the **Elder Abuse** Act to find that the only person with standing to pursue a claim is the very person accused of the **abuse**. See *Estate of Dito* (2014) 198 Cal. App.4th 791,800.¹

The policy of the law favors the Court finding standing for the Plaintiffs regarding their **elder abuse** claim. Therefore, the Court should overrule the demurrer to this claim.

IV. JAMES AND TERESITA HAVE STANDING TO PURSUE THEIR CLAIM FOR **ABUSE OF DURABLE POWER OF ATTORNEY AS CHILDREN OF THEIR DECEASED FATHER FRANCISCO ERMITANO CASAL.**

[Section 4540 of the California Probate Code](#) allows a relative of a principal to bring a petition under the Probate Code regarding powers of attorney. Moreover, [§4541 of the California Probate Code](#) specifically states that a petition under the part may be brought for the purpose of “passing on the acts” of the attorney-in-fact and compelling the attorney-in-fact to submit an

accounting. See Cal. Prob. C. §§4540, 4541. This Court is authorized to make all orders and take all other action necessary or proper to dispose of the matters presented in this Petition. See Cal. Prob. C. 4520.

The Defendant argues that the claim of **abuse** for a power of attorney expires when the principal suffers death. However, the Defendant cites no authority for the proposition that the requested relief for an accounting and for a judicial review of the acts taken by the Defendant when she had the durable power of attorney also expired when FATHER died. Of course, this position makes no sense because were the Court to adopt the position of the Defendant, the Defendant would be free to commit illegal acts with no worry of any consequences so long as the principal died before any legal action were taken against the attorney-in-fact.

In addition, the Defendant argues that Plaintiffs did not ask for an accounting of her actions while she held the durable power of attorney for her FATHER. The allegations made in paragraph 20 of the Petition sufficiently state that an accounting was requested within sixty (60) days of the Petition.

By reason of the foregoing, it is proper for the Court to overrule the demurrer to this claim.

V. CONCLUSION.

Plaintiffs request the Court to overrule Defendant's demurrer in its entirety and to order Defendant to answer the Petition within ten (10) days following any order as such. Alternatively, should the Court be inclined to grant part or all of the demurrer, Plaintiffs request leave to amend the Petition. (Amendment should be liberally granted and a party given a fair opportunity to correct any defect. See *Okun v. Sup. Ct. (Maple Properties)* (1981) 29 Cal.3d 442, 460.)

Dated: June 20, 2014

Respectfully Submitted,

CATANESE & WELLS A Law Corporation

By:

T. Randolph Catanese

Attorney for Plaintiffs

JAMES L. CASAL and TERESITA CLARKSON

Footnotes

- 1 Defendant cites the case of *Lichter v. Lichter* (2010) 189 Cal. App.4th 712 for the proposition that §377.11 of the California Civil Code precludes Plaintiffs claim for **elder abuse**. The Lichter case references the Lowrie case without a dissenting comment and found that the plaintiffs did not have standing only because they had already been paid amounts owed and therefore they had no interest which could be impaired or defeated in the proceeding. Therefore, if anything, the Lichter case confirms why this Court should overrule the demurrer. (The Lichter court concluded that an "interested person" is someone who "has an interest of some sort that may be impaired, defeated or benefited by the proceeding at issue." *Id.* at 726.)